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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-770

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.,
Respondents.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

CONSOLIDATION COAL COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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OPPOSITION OF RESPONDENTS CONSOLIDATION COAL COMPANY, ET AL.

Respondents Consolidation Coal Company, *et al.*[1] oppose the Petition for a Writ of Certiorari filed by the Solicitor General on behalf of the Environmental Protection Agency (EPA) and its Administrator, to review portions of the opinions of the United States Court of Appeals for the Fourth Circuit in *National Crushed Stone Ass'n* v. *EPA*, 601 F.2d 111 (4th Cir. 1979), and *Consolidation Coal Co.* v. *Costle*, 604 F.2d 239 (4th Cir. 1979).

OPINIONS BELOW AND JURISDICTION

The opinions below are set forth in the Appendix to the Government's Petition. A statement concerning the Court's jurisdiction is set forth at page 2 of the Petition. We agree with that statement.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether regulations promulgated by EPA establishing effluent limitations based upon application of "best practicable technology currently available" (BPT limitations) pursuant to section 301(b)(1)(A) of the Clean Water Act, 33 U.S.C. § 1311(b)(1)(A) (1976), must include variance provisions that allow consideration of whether the discharger is doing all that the maximum use of technology within its economic ability will permit and whether such use will result in reasonable further progress toward eliminating pollutant discharges?

2. Whether the Fourth Circuit's review of EPA's BPT variance for the crushed stone, construction sand and gravel and coal industries was premature?

[1] Consolidation Coal Company, Bethlehem Steel Corporation, National Coal Association, Peabody Coal Company, AMAX, Inc., Gibralter Coal Corporation, The Drummond Company, North American Coal Corporation, National Steel Corporation, Republic Steel Corporation, United States Steel Corporation, Cedar Coal Company, Central Appalachian Coal Company, Central Coal Company, Central Ohio Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company.

STATUTE INVOLVED

Pertinent portions of sections 301 and 304(b) of the Clean Water Act, 33 U.S.C. §§ 1311, 1314(b) (1976 and Supp. I, 1977), are set forth in Appendix E to the Government's Petition.

PRELIMINARY STATEMENT

1. The Federal Water Pollution Control Act Amendments of 1972 (FWPCA), Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. § 1251 *et seq.* (1976), made unlawful the discharge of pollutants into the nation's waters without a permit issued under section 402 of the FWPCA. *See* 33 U.S.C. §§ 1311(a), 1342 (1976).

Section 402(a) established the National Pollutant Discharge Elimination System (NPDES) and provides that any NPDES permit must require compliance with all applicable terms of section 301 of the FWPCA. 33 U.S.C. § 402(a) (1976). The relevant portion of section 301 states that "there shall be achieved . . . not later than July 1, 1977, effluent limitations for point sources . . . which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Title." 33 U.S.C. § 1311(b)(1)(A) (1976).[2]

Section 304(b) of the FWPCA in turn required EPA within one year of enactment to publish "regulations providing guidelines for effluent limitations" for existing point sources that were to be based upon consideration of several factors, including "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application. . . ." 33 U.S.C. §§ 1314(b), 1314(b)(1)(B) (1976).

[2] The term "point source" is defined at section 502(14) of the Act. 33 U.S.C. § 1362(14) (1976).

In addition to these BPT effluent limitations, the FWPCA also established a second stage of more stringent effluent limitations based on the "best available technology economically achievable" (BAT limitations). These BAT limitations originally were to be achieved by "categories and classes of point sources" by July 1, 1983. 33 U.S.C. § 1311(b)(2)(A) (1976).

The FWPCA was amended by the Clean Water Act of 1977 (CWA), Pub. L. No. 95-127, 91 Stat. 1566, 33 U.S.C. § 1311 *et seq.* (Supp. I, 1977), and by the Act of Nov. 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467. Certain aspects of these amendments are pertinent to the issues raised in the Government's Petition. First, Congress extended the compliance date for achieving BAT effluent limitations. Amended section 301(b)(2)(C) now requires BAT limitations for toxic pollutants to be achieved by July 1, 1984. 33 U.S.C. § 1311(b)(2)(C) (Supp. I, 1977). For all other pollutants, BAT limitations must be achieved by existing dischargers sometime between July 1, 1984, and July 1, 1987, depending on the date EPA promulgates the limitations. 33 U.S.C. § 1311(b)(2)(F) (Supp. I, 1977). Second, a new class of pollutants subject to effluent limitations based on the "best conventional pollutant control technology" (BCT) was created. 33 U.S.C. § 1311(b)(2)(E) (Supp. I, 1977). These BTC limitations must be met by July 1, 1984. *Id.*

2. This Court first reviewed the requirements of the FWPCA in *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976), in which it stated that permits issued under section 402 of the Act serve "to transform generally applicable effluent limitations . . . into the obligations . . . of the individual discharger." *Id.* at 205. It was not until its opinion in *duPont* v. *Train*, 430 U.S. 112 (1977), however, that the Court resolved the question of how these "generally applicable

effluent limitations" were to be developed. In *duPont*, the Court noted that BAT effluent limitations must be established as nationally uniform regulations "for categories and classes of point sources," but that the FWPCA was less clear on whether BPT limitations were to be set uniformly on the basis of categories or classes, or whether they must be set separately for each individual point source. *See id.* at 124-27. After reviewing the Act and its legislative history, the Court held that EPA was authorized to promulgate regulations establishing uniform BPT effluent limitations for categories of plants, but only "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations." *Id.* at 127-28 (footnote omitted).[3] The Court did not examine EPA's BPT variance clause in *duPont*. It merely agreed with the Fourth Circuit's decision below "that consideration of whether EPA's [BPT] variance provision has the proper scope would be premature." *Id.* at 128 n.19 (citing *duPont* v. *Train*, 541 F.2d 1018, 1028 (4th Cir. 1976)).

3. The Fourth Circuit's *Crushed Stone* opinion climaxed a rather lengthy debate between EPA and that court over the "proper scope" of the BPT variance. After summarizing its BPT variance holding in *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1358-60 (4th Cir. 1976), the court in *Crushed Stone* discussed EPA's response to that holding and traced the interpretations that EPA had given the BPT variance since this Court's *duPont* decision. 601 F.2d at 122-23. Based on this analysis, the Fourth Circuit rejected the Agency's claim that review of the validity of the variance provision was premature. *Id.* at 122-23. On the merits, the Fourth Cir-

[3] The Court also held that new source performance standards promulgated under FWPCA section 306, 33 U.S.C. 1316 (1976), may not contain any variance provisions. 430 U.S. at 137-39.

cuit held that the BPT variance contained in the effluent limitation guidelines regulations for the crushed stone, construction sand and gravel industry, as interpreted by EPA, was invalid because it failed, among other things, to allow consideration of the statutory factors set forth in section 301(c) of the Act. *Id.*

In holding EPA's variance provision invalid, the Fourth Circuit specifically rejected EPA's claim that the *Appalachian Power* decision meant that a plant may "secure a BPT variance by alleging [and proving] that the plant's own financial status is such that it cannot afford to comply with the National BPT limitation." *Crushed Stone*, 601 F.2d at 123. Instead, the Fourth Circuit held that EPA must establish a BPT variance which provides some consideration of the economic cost factors set out in section 301(c) of the CWA and that proper consideration of those factors in the context of a BPT variance request would require a determination whether the discharger " 'is doing all that the maximum use of technology within its economic capability will permit *and* [whether] such use will result in reasonable further progress toward the elimination of the discharge of pollutants.' " *Id.* at 123-24 (emphasis in original). Even this determination would not, however, necessarily entitle the requestor to a variance. It would be only one of a number of factors to be considered. *Id.*

In *Consolidation Coal* the Fourth Circuit summarily set aside a BPT variance provision identical to that at issue in *Crushed Stone*. 604 F.2d at 243-44.

4. The D.C. Circuit in *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011 (D.C. Cir. 1978), addressed EPA's standard BPT variance in the context of its review of EPA's effluent limitations for the paper industry. *See* 590 F.2d at 1032. However, in contrast to the Fourth Circuit, the D.C. Circuit emphasized that its review of the variance

was "quite narrow." 590 F.2d at 1033. The court sought only to determine whether the BPT variance for the paper industry, "has a capacity for the degree of flexibility that *duPont* deemed crucial to the legality of any general set of industry-wide effluent limitations under the Act." 590 F.2d at 1033. The D. C. Circuit court cautioned that it was only conducting "a threshold review of the provision." 590 F.2d at 1032. It stated clearly that it was not rendering judgment on its "application in specific cases, or *on its precise interpretation* . . . ." *Id.* at 1033 (emphasis added).

The D. C. Circuit then interpreted this Court's decision in *duPont* as requiring "[a]t minimum . . . that [EPA] must give permittees the ability to secure variances from the 1977 limitations analogous to their statutorily provided ability to secure the same with respect to the 1983 [BAT] standards." 590 F.2d at 1034 (footnote omitted). That court went on to hold, as the Fourth Circuit had previously, that "the '*total cost*' of pollution control" in relation to "the effluent reduction benefits to be achieved" is a relevant consideration in a BPT variance decision. 590 F.2d at 1036 (emphasis in original). Based on the evidence before it, the D. C. Circuit then held that EPA's BPT variance for the pulp paper industry, was "*capable* of sufficient flexibility to buttress its claim of authority to limit 1977 effluent discharges by way of general regulations." 590 F.2d at 1040-41 (emphasis in the original).

REASONS FOR DENYING THE PETITION

The Government has asserted essentially four reasons why this Court should review the Fourth Circuit's BPT variance holdings in *Crushed Stone* and *Consolidation Coal*:

1. These decisions directly conflict with the D. C. Circuit's *Weyerhaeuser* decision;

2. This conflict involves an important federal question warranting this Court's immediate review because EPA will be unable to effectively and consistently administer its BPT variances for all industries until it is resolved, and because this Court will never again be able to review the BPT variances for the three industries affected by this alleged conflict;

3. The Fourth Circuit's BPT variance decisions would impede the statutory goal of eliminating water pollution; and

4. The Fourth Circuit's decisions are "wrong."

These contentions lack merit. The issues posed in the Government's Petition neither require nor support this Court's review of the Fourth Circuit's *Crushed Stone* and *Consolidation Coal* decisions.

A. *There is No Clear Conflict Between the Fourth and D.C. Circuits.* There is no irreconcilable conflict between the Fourth and D.C. Circuits on the BPT variance issue. On the contrary, the two circuits are in substantial agreement. First, both circuits agree that EPA's BPT variance must relate to BPT effluent limitations in a manner analogous to the relationship between section 301(c) and the 1984 BAT limitations. *Compare* 601 F.2d at 124 *and* 545 F.2d at 1359 *with* 590 F.2d at 1034. Second, both circuits agree that "total cost" in relation to pollution reduction benefits must be considered in any BPT variance. *Compare* 601 F.2d at 123-24 *with* 590 F.2d at 1036. Third, both circuits agree that this balancing of costs versus pollution reduction benefits is but one of several factors which EPA must consider when determining BPT variances. *Compare* 601 F.2d at 124 *with* 590 F.2d at 1036. The *Weyerhaeuser* court stated that "so long as those costs relative to the pollution reduction gains are not different from those that may be imposed on the industry as a whole, the difficulty, or in

fact the inability, of the operator to absorb the costs *need not control* the variance decision." 590 F.2d at 1036 (emphasis omitted from the original and added.) Similarly, the Fourth Circuit in *Crushed Stone* rejected the notion that a plant could obtain a variance simply because it could not "afford to comply with the national BPT limitation.'" 601 F.2d at 123. Instead, that court held that the discharger's economic capability, balanced against the maximum pollution reduction which it can and has achieved, may justify a BPT variance "'*should [the discharger] comply with any other requirements of the variance.*'" 601 F.2d at 124 (emphasis added).

Neither the Fourth nor D.C. Circuits perceived the sharp conflict claimed by the Government. The Fourth Circuit in *Crushed Stone* noted that "our construction of the variance provision seems to be generally, if not precisely, in accord" with that of the D.C. Circuit. 601 F.2d at 124. And the D.C. Circuit, having cited with approval the *Appalachian Power* decision, *see* 590 F.2d at 1036 n. 35, 1038, 1039 n. 38 stated simply that the Fourth Circuit's view of the variance "*may* be *somewhat* broader than ours." *Id.* at 1036 n. 35 (emphasis added).

Moreover, the D.C. Circuit has not yet issued a final decision on the validity of EPA's BPT variance for the paper industry. The *Weyerhaeuser* court explicitly and repeatedly pointed out that it was conducting only a "threshold review" of EPA's BPT variance for the pulp paper industry to determine whether that provision was "capable" of the requisite flexibility of application. The court expressly stated that it was not ruling on the "precise interpretation" to be given the variance. 590 F.2d at 1033.

Should any future BPT variance requests be filed by industries other than those involved in the *Crushed Stone*, *Consolidation Coal* and *Appalachian Power* decisions, fed-

eral court review of those requests, including possible review by this Court, would always be available.[4] In any review of such variance requests, this Court could issue an opinion dispositive of the proper scope of BPT variance clauses for all industries. Moreover, should a future BPT variance request by any industry arise under the jurisdiction of the D.C. Circuit, that Court may at last reach a "final review" of this issue. *See Weyerhaeuser*, 590 F.2d at 1032, 1033 n.29. Only then would any conflict between the Fourth and D.C. Circuits be concrete and appropriate for resolution by this Court.

B. *The BPT Variance Issue Does Not Pose an Important Federal Question.* The Government claims that the BPT variance issue raises an important federal question because EPA's ability to effectively administer and enforce effluent limitations will be severely impeded unless this Court immediately determines the proper scope of a BPT variance clause for all industries. There is no basis for this contention.

The proper scope of BPT variances for the crushed stone, construction sand and gravel and coal industries was a significant issue at the time the actions for review in *Consolidation Coal* and *Crushed Stone* were filed in the Fourth Circuit. However, it is now over two years after the July 1, 1977 deadline for complying with BPT effluent limitations. It is reasonable to assume that most petitions for BPT variances would have been filed by now.

[4] Any future BPT variance request will most probably occur in the context of an actual NPDES permit application. Section 509 (b)(1) of the Act provides for federal appellate court review of any EPA-issued permit. 33 U.S.C. § 1369(b)(1) (1976). *See generally Weyerhaeuser*, 590 F.2d at 1033 n.29. At least one court has also held that federal district courts may review EPA's veto of a state-issued NPDES permit which the Agency deems to contain an improper BPT variance. Crown Simpson Pulp Co. v. Costle, 599 F.2d 897, 904 & n.5 (9th Cir. 1979). *See also* Republic Steel Corp. v. Train, 581 F.2d 1228 (6th Cir. 1977) (court of appeals review of EPA veto of state issued permit).

The Government does not offer any support for its fear that it will be deluged by BPT variance requests from dischargers in the steam electric, crushed stone or coal industries in reliance on the Fourth Circuit's decisions in *Appalachian Power*, *Crushed Stone* or *Consolidated Coal* or that it will receive numerous requests from dischargers in other industries claiming that they should also be beneficiaries of the Fourth Circuit's reasoning.[5] In other words, the issue is now of less than critical importance.[6]

Nor are the Fourth Circuit's decisions disruptive of the Act's goal of nationally uniform discharge limitations. The purpose of any variance is to provide a "safety value" from a uniform regulatory scheme that otherwise would be unduly rigid. The Fourth Circuit has merely interpreted the proper scope of the variance clause contained in EPA's nationally applicable regulations for one industry. If the Government's assertions were correct, any variance clause would be disruptive of the goals of the

[5] The *Appalachian Power* decision was issued in mid-1976 and the Fourth Circuit's mandate shortly thereafter. It is most likely that any variance requests based on that decision would have been filed by now. Since virtually all of the BPT limitations for the crushed stone, construction sand and gravel industry were set aside by the Fourth Circuit in *Crushed Stone*, it is unlikely that many variance requests will be submitted by dischargers in that industry. And, EPA has not provided any evidence that it has reason to expect numerous requests for variances from dischargers in the coal industry.

[6] The Government's argument that this issuse poses an important federal question ignores another crucial fact. Point source dischargers in major industries will have to comply with BAT limitations for toxic pollutants and BCT limitations by July 1, 1984. 33 U.S.C. § 1311(b)(2)(C), (E) (Supp. I, 1977). *See generally* NRDC v. Train, 8 ERC 2120 (D.D.C. 1976), *as modified*, 12 ERC 1833 (D.D.C. 1979). Installation of the complex technology necessary to meet these second-stage effluent limitations will necessarily require considerable time and effort. Clearly, most dischargers will be preparing to comply with BAT and BCT limitations rather than seeking to obtain variances from BPT limitations with which the Act required them to comply by 1977.

Act. The Court has previously rejected this view. *See duPont* v. *Train*, 430 U.S. at 128.

The Government also contends that significant increases in water pollution will occur as a result of the Fourth Circuit's decisions because EPA will be forced to grant numerous 1977 BPT variance requests based only on the discharger's economic capability. *See* Petition at 15-16. This concern ignores the actual holding in *Crushed Stone*. As discussed above, the Fourth Circuit never held that the individual discharger's economic inability to comply was by itself a sufficient basis for granting a BPT variance. Instead, that court made clear that "progress towards the elimination of discharge of pollutants" or effluent reduction benefits was an equally important factor. *See* 601 F.2d at 123-24.

C. *The Fourth Circuit's Review of the BPT Variance Was Not Premature.* Contrary to the Government's assertions, the Fourth Circuit correctly decided that the BPT variance clauses for the coal and crushed stone industries were ripe for judicial review. And, the D.C. Circuit was in agreement with the Fourth Circuit on this issue.[7] In fact, the Government itself admits "the Administrator's position on the variance clause has now become clear and presents a discrete legal issue that is capable of pre-enforcement review." Petition at 21.

Moreover, EPA promulgated the BPT variance provisions at issue in *Crushed Stone* and *Consolidated Coal* as a part of effluent limitations guidelines regulations for those industries. Section 509 of the CWA expressly provides for federal appeliate court review of EPA's "action . . . in approving or promulgating any effluent limitation

[7] "In the three years that have now elapsed since *duPont* was briefed and argued in the Fourth Circuit . . . enough indicia of the Agency's attitude toward the 1977 variance provision under the Act has accumulated so that its administration is anything but 'a matter of speculation.'" *Weyerhaeuser*, 590 F.2d at 1032.

or other limitation under section 301." 33 U.S.C. § 1369 (b)(1) (1976). Indeed, after this Court's *duPont* decision, some review of these variance provisions was essential to determining the validity of EPA's regulations establishing uniform BPT effluent limitations. *See* 430 U.S. at 128; *Weyerhaeuser*, 590 F.2d at 1032.

Finally, this Court in *duPont* did not hold that any judicial review of a BPT variance clause must await an actual application for a variance. Instead, this Court simply deemed any consideration of the proper scope of such a clause premature in that case. 430 U.S. at 128 n.19. This deferral of consideration was reasonable because EPA had at that point not clearly stated its final position on the issue. Only when EPA's position was clarified did the Fourth Circuit address the issue. *See Appalachian Power*, 545 F.2d at 1359 n.22. Also, the BPT variance issue raised in *Crushed Stone* and *Consolidation Coal* was not before this Court in *duPont* because it was not raised by either the chemical company petitioners or EPA in that case. Consequently, the Court could not have reached the issue because its holdings are limited to the issues actually presented it for decision. *Cf. Baker* v. *Carr*, 369 U.S. 186, 265-66. (1962) (Stewart, J., concurring) (Court's opinions restricted to those issues properly before it).

D. *The Fourth Circuit's Decisions Were Correct.* The Fourth Circuit in *Appalachian Power* held that any BPT variance must consider at least all the factors relevant to establishing BPT effluent limitations. 545 F.2d at 1359.[8]

[8] Much of the Government's argument ignores the fact that a BPT variance does not relieve the discharger from meeting BPT limitations. Instead, as EPA itself has previously stated, a BPT variance clause "allows case-by-case redefinitions of BPT where one can show that certain plant-specific factors . . . are 'fundamentally different' from the factors EPA considered in setting the national guidelines." 43 Fed. Reg. 50042 (Oct. 26, 1978). *See also Weyerhaeuser*, 590 F.2d at 1034-36.

The D.C. Circuit in *Weyerhaeuser* agreed with the Fourth Circuit on this issue. *See* 590 F.2d at 1035-36. This requirement entails some consideration of cost versus pollution reduction since BPT limitations themselves must reflect this consideration. *See* 33 U.S.C. § 1314(b)(1)(B) (1976). The Fourth Circuit also reasoned that it would be incongruous if BPT limitations were to be more rigorous and less flexible than BAT limitations, since Congress clearly intended these BAT limitations to be the most demanding technology-based pollution controls on existing sources. *Crushed Stone*, 601 F.2d at 124; *Appalachian Power*, 545 F.2d at 1359. Finally, the Fourth Circuit expressly rejected the argument that an individual discharger's economic inability to comply with national BPT limitations requires that he be granted a variance from those limitations. 601 F.2d at 123-24. On the contrary, the court concluded only that the discharger's economic capability should be considered as one factor in a BPT variance determination if he is also making every possible effort to eliminate his pollution discharges, and if those efforts "will result in reasonable further progress" toward eliminating those discharges. 601 F.2d at 124.

Those portions of the Act's legislative history cited by the Government at pages 17-18 of its Petition are inapposite. Congress did not address the issue of BPT variances when drafting the FWPCA. Instead, such a variance is required in order to preserve EPA's ability to promulgate effluent limitations as nationally uniform regulations. *See duPont* v. *Train*, 430 U.S. at 128. Both the *duPont* decision and the Fourth Circuit's seminal *Appalachian Power* opinion, however, were issued prior to the enactment of the Clean Water Act in 1977. Yet Congress disapproved neither decision when amending the FWPCA. The Government's efforts to buttress its arguments through a misapplication of portions of the legislative history of the 1972 FWPCA should be disregarded.

In any event, the legislative history of the FWPCA indicates that the Fourth Circuit was correct in its view of the proper consideration of costs in a BPT variance proceeding. Rep. Jones, in explaining the Conference Committee Report on the FWPCA on the floor of the House, defined "total costs" as used in section 304(b)(1)(B) as

> "costs sustained by the owner or operator and those external costs such as potential unemployment, dislocation and rural area economic development sustained by the community area, or region."

1 Leg. Hist. at 321. Since consideration of these external costs would necessarily entail consideration of whether the costs of the limitations would force a shutdown of the particular discharger, it is hard to see how one could avoid considering "economic capability" in the context of consideration of "total costs."

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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